In the Supreme Court of the United States

Supreme Court, U. S.
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OCTOBER TERM 1978

No. 78-897

TEXAS EDUCATION AGENCY
(Austin Independent School District), et al.,
Petitioner,

v.

UNITED STATES OF AMERICA, et al.,
Respondents,

and

DEDRA ESTELL OVERTON, et al.,
Intervenor-Respondents.

Opposition to a Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit (Mexican-American Intervenors)

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Opposition to a Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit (Mexican-American Intervenors)

The Mexican American Intervenors respectfully oppose the Petition for a Writ of Certiorari requested by the Austin Independent School District (AISD).

QUESTION PRESENTED

The characterization by the AISD of the issues presented is argumentative and misstated. The sole issue is whether

the AISD engaged in acts of intentional segregation against Mexican American school children.

STATEMENT OF THE CASE

As set forth in Petitioners' statement of the procedural history of the case, there have been two (2) District Court opinions[1], four (4) Circuit Court opinions[2], and one (1) *per curiam* remand by this Court.[3] Various characterizations of these opinions by the Petitioners are, however, incorrect.

First, contrary to assertions by the Petitioners, the entire court of fourteen (14) judges in *Austin I* found the AISD to have been guilty of intentional discrimination against Mexican American students and that the District Court erroneously ruled to the contrary. Six (6) judges speaking through Judge Wisdom outlined the major acts which constituted that finding. 467 F.2d 852, 861-69. The remaining eight (8) judges concurred in this finding, but differed with respect to remedial directions. As those eight judges stated in their special concurrence,

> We concur in the result reached in the opinion prepared by Judge Wisdom to the extent of reversing and remanding the case to the district court with direction that the dual school system and all discriminatory segregation against Mexican and black students be eliminated "at once" . . .
>
> 467 F.2d at 883.

Secondly, although *Austin I* was rendered at a time when there was uncertainty surrounding the *de jure-de facto*

1. Neither District opinion is reported. The first opinion appears at p. 108 of the Appendix; the second opinion appears at p. 94 of the Appendix.

2. 467 F.2d 848 (5th Cir. 1972) (*Austin I*); 532 F.2d 380 (1976) (*Austin II*); 564 F.2d 162 (1977) (*Austin III*); a fourth opinion denying *en banc* reconsideration from *Austin III* is reported at 579 F.2d 910 (1978).

3. 429 U.S. 990 (1976).

distinction, it was the clear finding of all fourteen judges that the AISD had engaged in acts of segregation which were neither innocent nor adventitious. See Judge Wisdom's opinion, 467 F.2d at 861-69; note also the above language in the concurrences which called for the dismantlement of "discriminatory segregation"—not mere "segregation."

After having its opinion in *Austin I* "reversed" by the District Court, purportedly on the basis of this Court's intervening decision in *Keyes v. School District No. 1, Denver, Colorado,* 413 U.S. 189 (1973), a panel, speaking through Judge Wisdom, reversed the District Court a second time. 532 F.2d 380 (*Austin II*). For the second remand the Circuit Court, although alluding to the proof relied upon in *Austin I,* intimated that such proof was unnecessary to its holding. A petition for a writ of certiorari was filed with this Court in response to the *Austin II* holding. The United States, Plaintiff in this case, did not oppose the petition, expressing concern about the intimation that the factual basis undergirding the *Austin* decision was unnecessary. This Court granted the petition and remanded to the Fifth Circuit for reconsideration in light of *Washington v. Davis,* 426 U.S. 229 (1976).

The Petitioner's analysis of the *Austin III* decision, 564 F.2d 162 (1977), which followed remand, grossly misstates the thrust of that decision. Rather than "treat as irrelevant" the District Court's finding of no intent[4], the decision holds for the third time that such finding is clearly wrong. The charge that the Circuit Court was duplicitous in its analysis is belied by the factual findings of the Court *en banc* and by each of the supervising decisions that the segregation of Mexican American children was intentional.

4. Page 9 of Petition.

REASON FOR DENYING THE WRIT

At this juncture of the litigation, the sole issue, with one minor exception[5], is whether the Court of Appeals properly concluded that the AISD had committed acts of intentional segregation of Mexican American children. Issues concerning the scope of relief are not at issue at the present time.[6]

The Petitioners would have this Court believe that there are two issues presented in this case which should be of interest. The first issue is whether the "foreseeability" test is appropriate to measure segregatory intent. The second issue is whether a "benign" motive justifies intentional segregation on the basis of race. As interesting as these issues may be, neither is determinative of the propriety of the Circuit Court's holding. Further, both issues have been addressed, by this Court and by various lower courts; as such, it would serve no useful purpose to further review them.

A. In This Case a Conclusion of Intentional Segregation Is Compelled, Irrespective of the Standard Used to Ascertain Intent.

For approximately the past ten (10) years lower courts have been sifting through factual presentations seeking to ascertain whether non-statutory segregation was intentionally caused. Rarely has direct evidence of intent to segregate been available. In the absence of direct evidence, certain factual patterns have come to be recognized as the segregatory devices utilized by school districts to maintain, albeit imperfectly, separation between Anglo students and others. These devices include, *inter alia,* school placement, optional zones in changing neighborhoods, gerrymandered

5. See discussion *infra* at p. 15.

6. The Fifth Circuit remanded for consideration of the remedy in light of *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977); the discussion concerning remand is found at 564 F.2d 174-76.

school boundaries, use of portables and segregated faculty. Each of these commonly recognized devices was utilized in Austin and each succeeded in preserving a degree of segregation which would not have existed without it. Only a Court which chooses to blind itself to the import of these patterns could fail to find that they constituted an effort to maintain ethnic segregation.[7]

Before summarizing the use of these devices in Austin, it is important to recognize that there was direct unrefuted evidence of segregatory acts of a sort rarely found in the desegregation cases. The record reflects, for example, that the Comal Street School was built to "take care of the large number of non-English speaking students at Palm, Metz, and Bickler."[8] Likewise, Zavala School was built "to provide for the large group of Spanish-speaking citizens of Austin a suitable, well-equipped building as near the center of this

7. Such a Court would also be forced to blind itself to the history of discrimination against Mexican Americans in Texas which no doubt served as the foundation for a policy of segregation. On the same day that this Court rendered its decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), it also struck down a policy of exclusion of Mexican Americans from juries in Texas. *Hernandez v. Texas*, 347 U.S. 475 (1954); in so ruling, the Court observed:

> Here the testimony of responsible officials and citizens contained the admission that residents of the community distinguished between "white" and "Mexican." The participation of persons of Mexican descent in business and community groups was shown to be slight. Until very recent times, children of Mexican descent were required to attend a segregated school for the first four grades. At least one restaurant in town prominently displayed a sign announcing, "No Mexicans Served." On the courthouse grounds at the time of the hearing, there were two men's toilets, one unmarked, and the other marked "Colored Men" and "Hombres Aqui" ("Men Here").

347 U.S. 475, 479-80 (FN omitted). See also *Castaneda v. Partida*, 430 U.S. 482 (1977), cf. *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973).

8. Pre-trial Order, Attachment A, p. K-I.

population as possible."[9] In response to a complaint from Anglo parents at the Winn School, the Superintendent took the following action: ". . . all Mexican pupils enrolled in John B. Winn School, living south of 14th Street, had been transferred to Bickler School, except one boy who is being allowed to complete the 7th Grade."[10] This latter document contradicts assertions in Petitioner's Petition that only limited English speaking students were sent to Bickler.

In addition to these examples of direct evidence of segregatory intent, the Court in *Austin III* found that the School District had maintained dual overlapping zones. It is unrefuted that these zones were only found between predominantly Anglo and predominantly Mexican American schools. 564 F.2d 162, 171-72. The dual overlapping zone is essentially identical to the optional zone frequently found by courts to be a segregatory device. See e.g. *Morgan v. Kerrigan,* 509 F.2d 580, 589 (1st Cir. 1974), *cert. den.,* 421 U.S. 963; *United States v. Board of School Commissioners of Indianapolis,* 474 F.2d 81, 86 (7th Cir. 1973), *cert. den.,* 413 U.S. 920; *United States v. School District of Omaha,* 521 F.2d 530, 540-43 (8th Cir. 1975), *cert. den.,* 423 U.S. 946.

Petitioners do not dispute the Circuit Court's findings that these dual zones (a) were only found between Anglo and Mexican American schools, and (b) contributed to segregation; rather, they offer justification that shows the wisdom of the Circuit Court's conclusion that these zones were discriminatorily motivated. As to the West Avenue (Mexican-American) and Pease (Anglo) zones, the AISD merely asserts (without citation) that when the Mexican American students learned English they went to Pease (p. 23, Petition). This admission reaffirms what was previously an in-

9. Def. Ex. 125, p. 5; Gov. Ex. 6C, August 8, 1935.

10. Gov. Ex. 6F, Sept. 25, 1939.

ference—that students of different races were tracked to respective schools!

The justification for the Zavala (Mexican American)—Metz (Anglo) open zone is a limp protest that Mexican Americans were not required to go to the Mexican school (p. 22, Petition).[11] This, of course, confuses the issue. This device has been seen by the authorities as a means by which Anglo students could escape attendance, otherwise compelled, with Mexican American students.

The *en banc* Court in *Austin I* and the panel in *Austin III* further discussed at some length the gerrymandering of school boundaries and school site selection which contributed to the segregation of Mexican American children. The Court singled out for discussion the situation surrounding the building of O'Henry Junior High School in 1953. The evidence showed that it was built as a predominantly Anglo school and that in order to provide "relief" for Anglo students living in the Allan Junior High School neighborhood, the boundaries were adjusted so that many of these students could attend O'Henry. The predictable result was to further isolate Mexican American students. 564 F.2d at 173. The Court noted a similar occurrence surrounding the dispersal of students at the University Junior High School site after it was reclaimed by the University of Texas. Appendix "C" to the *Austin I* decision provides a further picture of intentional segregation through site selection. This chart describes the ethnic makeup of all schools which opened after 1954. Twenty-four (24) of thirty (30) schools opened with an enrollment in excess of 90% Anglo or minority. 467 F.2d at 882. This unbroken pattern, observed by the Circuit Court, raises a strong inference of intentional

11. No record citation is found in support of this contention. All the record evidence is to the contrary (Transcript 22, 36).

segregation of minority children.[12] Nothing in the record successfully rebuts this inference.

Adding further to the above-stated evidence of intentional segregation, the Court observed that its review of school boundary lines corresponded with ethnically and racially segregated neighborhoods. 467 F.2d at 863, n. 32. This further buttresses the inference of intentional gerrymandering.

Petitioner's response to these findings is to broadly ascribe neighborhood school motivations to this segregatory pattern. Some of the acts viewed in isolation might be susceptible to a neighborhood school argument; however, the pattern of activities which inevitably enhanced segregation, viewed in light of the direct evidence of segregation, necessarily compelled an unrebutted inference of improper motivation. See e.g. *Davis v. School District of Pontiac, Inc.*, 443 F.2d 573, 576 (6th Cir. 1971), *United States v. Board of School Comm'rs of Indianapolis, Ind.*, 474 F.2d 81, 84 (7th Cir. 1973). It was clearly erroneous for the District Court to have ruled to the contrary.

Various courts have found faculty segregation especially probative on the issue of intent since it is so fully within the power of the school district to control.[13] Appendix "A" to

12. This Court has several times noted the segregative power that school boards have through the use of site selection. *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 21 (1971), *Keyes v. School District No. 1*, 413 U.S. 189, 201-202 (1973).

13. This court observed in *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 18, that "Independent of student assignments where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff—a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown." See also *United States v. Board of Comm. of Indianapolis*, 474 F.2d 81, 87 (7th Cir. 1973), *cert. den.*, 423 U.S. 946; *Oliver v. Michigan State Board of Education*, 508 F.2d 178, 185 (6th Cir. 1974); *cert. den.*, 421 U.S. 963 (1975) (Kalamazoo); *United States v. School District of Omaha*, 521 F.2d 530, 537-38 (8th Cir. 1975), *cert. den.*, 423 U.S. 946; *Kelley v. Guinn*, 456 F.2d 99 (9th Cir. 1972).

the *Austin I* decision shows that Mexican American faculty members were generally assigned to predominantly minority schools. While Mexican Americans constituted only three percent (3%) of the total professional staff of the school district,[14] fifteen percent (15%) of the teachers at predominantly minority Johnston High School were Mexican American. Indeed, fifteen (15) of the twenty-three (23) Mexican American high school teachers taught at Johnston, although Johnston only constituted one (1) of eight (8) high schools. At the elementary school level, Mexican American teachers are found at only fourteen (14) of the District's fifty-five (55) schools, and of those fourteen, only four are predominantly Anglo. All of the remaining ten (10) schools at which Mexican American faculty were found had minority enrollments in excess of seventy-five percent (75%) and eight (8) had minority enrollments in excess of ninety percent (90%).

In this brief summary we have obviously not set forth all of the evidence presented to show segregatory intent. What we have tried to show is the existence of well-recognized segregatory patterns which virtually all courts have found to undergird a finding of intentional segregation. These findings have been made irrespective of the formal methodology utilized to ascertain intent. It is thus manifestly unnecessary to evaluate the natural and foreseeable method for ascertaining intent to arrive at a conclusion in the instant case that the segregation existent in the AISD is *de jure*.

14. At the time, Mexican American students constituted twenty percent (20%) of the District enrollment.

B. Logic and This Court's Precedents Support the Use of the Natural and Foreseeable Test for Ascertaining Intent to Segregate.

In its most recent opinion, the Fifth Circuit utilized language that indicated that it was measuring at least some acts to determine if they were part of a pattern which naturally and foreseeably led to segregatory consequences. Through this standard evidentiary approach, the Court was able to conclude that an inference arose that those acts were intentionally motivated. These findings provided a firm foundation in addition to those findings based on direct evidence of segregatory intent (cited, in part, above) for a ruling that the Defendants should have a heavy burden of rebuttal. The AISD challenges the propriety of using this standard tool for raising an inference of intent to segregate. Their challenge violates both logic and a long line of precedent.

The most commonly accepted method for proving intent has been through a presumption drawn from the natural and foreseeable consequences of acts. This is understandable since realistically no other reliable mechanism exists. This is doubly true when intent to segregate is at issue; as recently observed by the Sixth Circuit,

> Indeed, it would be difficult, and nigh impossible, for a district court to find a school board guilty of practicing *de jure* segregation, unless the court is free to draw an inference of segregative intent or purpose from a pattern of official action or inaction which has the natural, probable, and foreseeable result of increasing or perpetuating school desegregation.
>
> *NAACP v. Lansing Board of Education,* 559 F.2d 1042, 1047-48 (6th Cir. 1977) [FN omitted].

As the Circuit Court acknowledged, it has long been the rule in the area of torts that an actor is held to intend the

reasonably foreseeable results of his actions. W. Prosser, *The Law of Torts,* § 8 (4th Ed. 1971); *Restatement 2d of Torts,* § 8A, comment (b) (1965). Likewise, in the area of criminal law a foreseeability standard has long prevailed. Hart, *Punishment and Responsibility,* 120-21 (1968). This Court has ruled that a presumption of intent to interfere with union rights under the National Labor Relations Act arises from conduct which does so interfere, observing that ". . . [T]he employer in such cases must be held to intend the very consequences which foreseeably flow from his actions and if he fails to explain away, to justify, or to characterize his actions as something different than they appear on their face, an unfair labor practice charge is made out." *National Labor Relations Board v. Erie Resistor Corp.,* 373 U.S. 221, 228 (1963). More directly, as the Circuit Court in the instant case observed, the holding in *Monroe v. Pape,* 365 U.S. 167, 187 (1961) adopts the foreseeability standard in litigation, such as this, which is predicated upon 42 U.S.C. § 1983.

While the natural and foreseeable standard is the only logical approach for determining intent, it has not been held either by the Circuit Court in this case or by those authorities above cited as creating an irrebuttable or conclusive presumption. The failure to recognize this fact is the source of the School District's mistake in arguing that the test and the *de jure* standard are inapposite. It might be true, as the AISD argues, that if a court were to conclusively presume that racial imbalance was the product of intentional acts, the court would be measuring a *de jure* requirement against a *de facto* standard. However, if a court were to conclude that racial imbalance in a school system had naturally flowed from the building program of the District, it could and should *infer* intent without adopting a *de facto*

standard. The burden would be shifted to the District to show non-racial reasons for the imbalance. This was the approach utilized in the instant case.

As observed by the Court in *Oliver v. Michigan State Board of Education,* 508 F.2d 178 (6th Cir. 1974) (a school desegregation case adopting the natural and foreseeable test):

> The regimen of presumption of intent established by objective facts and affirmative defense to rebut the inference of improper intent follows the practice in employment discrimination cases. See *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 [citations omitted] (1973); *Long v. Ford Motor Co.,* 496 F.2d 500 (6th Cir. 1974).

Likewise, in *United States v. Board of School Commissioners of Indianapolis, Ind.,* 474 F.2d 81, 88 n. 8 (a school desegregation case adopting the natural and foreseeable standard), the Court noted:

> We note that such inferences are not unique to this area of the law. The doctrine of "conscious parallelism" in anti-trust law involves a similar inference of intent from objective factors. See Anti-Trust Developments, 1955-1958, at 22-24. See also *Littlejohn v. Berbling,* 468 F.2d 389, 408 (7th Cir. 1972).

In a recent article in the Harvard Law Review, Paul Brest offers two policy reasons why a rebuttable presumption triggered by the natural and foreseeable test makes especial sense in the school desegregation context. Brest states:

> This shifting of the burden of proof is justified on two grounds. First, the school district enjoys far better access than the Plaintiffs to the true reasons underlying the myriad of decisions that determine the extent

> of school desegregation—decisions concerning such matters as the drawing of attendance zone lines, the location and size of new schools, and the closing of old ones. Second, despite indications of support for some degree of school integration, it is reasonable to assume that school boards throughout the nation tend to reflect the desires of many white constituents to avoid having their children attend schools with too high a proportion of minority students."
>
> Brest, "The Supreme Court, 1975 Term—Foreword: In Defense of the Anti-Discrimination Principles", 90 HARV. LAW REV. 1, 29-30 (1976).

The panel in the instant case, as well as each of those cases which has expressly adopted the natural and foreseeable standard, has used it as a rebuttable presumption. See e.g. *Morgan v. Kerrigan,* 509 F.2d 580, 588-89 (1st Cir. 1974), *cert. den.,* 421 U.S. 963; *Hart v. Community School Board of Education,* 512 F.2d 37, 50-51 (3rd Cir. 1975); *Oliver v. Michigan State Board of Education,* 508 F.2d 178, (6th Cir. 1974); *cert. den.* 421 U.S. 963 (1975); *United States v. Board of School Commissioners,* 474 F.2d 81, 88 (7th Cir. 1973), *cert. den.,* 413 U.S. 920 (1973); *United States v. School District of Omaha,* 521 F.2d 530, 535-36 (8th Cir. 1975), *cert. den.,* 423 U.S. 946.

Contrary to assertions made by Petitioners, there is no circuit which has requested the 'natural and foreseeable' test. The cases cited (N. 4, Petitioner's brief) from the Ninth Circuit merely reaffirm that intent is a necessary element in establishing liability in a desegregation case. *Soria v. Oxnard School District,* 488 F.2d 579 (9th Cir. 1973), *cert. den.,* 416 U.S. 951 (1974). They do not purport to set a standard or methodology for ascertaining intent. The natural and foreseeable standard was used properly in the instant case.

Contrary to statements by Petitioners, the AISD justifications were obviously weighed by the Circuit Court and found wanting. While it is true that the Circuit Court did not take specific findings and conclusions of the District Court and make declarations of "erroneous" or "not erroneous", such was not possible since specific findings and conclusions were not made by the District Court. A review of that Court's opinion[15] will quickly make clear the impossibility of imposing such a burden on the Circuit Court; rather, as is apparent from the extensive review of the evidence in *Austin I* and the reappraisal of that evidence in *Austin III*, the Circuit Court has performed a monumental task of measuring the District Court's general conclusions against the evidence. Criticism by the AISD of the Circuit Court on that score widely misses the mark.

C. Benign Motives Did Not Motivate the Segregation of Mexican American Pupils in Austin; Even if Some Segregation Could Be Classified as Benignly Motivated, Such Is Not Adequate Justification for the Outcome.

The AISD petition would leave the Court with the impression that all intentional segregation practiced by the District had the end of remediating English language problems. A review of the evidence previously outlined would show that most segregatory acts performed by the District were not narrowly limited to limited English speaking students. The gerrymandering of school boundaries or the placement of schools at points assuring segregated student bodies, for example, are not language specific; rather, they struck at all Mexican American children irrespective of linguistic proficiency.

It further is difficult to believe that benign motives led to the segregation of limited English speaking students

15. Appendix, p. 94.

when in fact state law prohibited teachers from speaking a language understandable to the students and instruction was provided only in English.[16]

Finally, if one were to accept the argument that "benevolence" was one of the motivating factors for some of the acts of segregation, such would be an insufficient legal justification. *Clemons v. Board of Education of Hillsboro Co.*, 228 F.2d 853, 859 (6th Cir. 1956); *Oliver v. Michigan State Board of Education*, 508 F.2d 178, 182-83 (6th Cir. 1974), *cert. den.*, 421 U.S. 963 (1975); see also *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Board of Regents of California v. Bakke*, ... U.S. ....., 57 L.Ed. 2d 750 (1978). One suspects that every act of segregation or discrimination has, as in the instant case, been met by a claim by the perpetrator of benign motivation. This Court, as reflected in the above-cited authorities, has regularly and summarily rejected this claim.

D. The Circuit Court of Appeals Was Clearly Correct in Reversing an Order Which Kept Black Children Segregated in Grades Kindergarten Through Five.

By its remand, the Fifth Circuit ordered the District Court to conduct a *Dayton* hearing; it also reiterated its ruling that the previous order by the District Court with respect to the integration of black children was inappropriate.

16. Related to this claim is the argument by the AISD that patterns of teacher segregation, which are manifested in the chart at 467 F.2d at 876-79, are merely reflective of their efforts to provide bilingual programming. That chart shows student and staff distribution in 1970-71. The first state-mandated bilingual program called for programming at Grade 1 for the school year 1974-75. (SB 121; presently § 21.451-21.460 Tex. Ed. Code). No evidence in the record reflects a substantial initiative independent of the state-mandated program.

The Plan adopted by the District Court for these children starkly reflects the barriers that the Circuit Court has had to overcome in the instant case. That Plan exempted Grades Kindergarten through 6. It also relied exclusively on the one-way busing of the black children. The Circuit Court was clearly correct in finding this plan constitutionally inadequate.

The thrust of the Petitioner's argument on this issue is that the School District provided the District Court factual support for finding that the continued segregation of black children in six grades met the conditions set forth in *Swann v. Charlotte-Mecklenberg Board of Education,* 402 U.S. 1 (1971). A thorough review of the record belies this contention. Rather than present any significant evidence that geographic or other conditions unique to Austin precluded desegregation of these children, the school district relied on general testimony by Dr. Davidson, the Superintendent, that he did not consider busing of such children to be educationally advantageous. Indeed, a blanket exclusion of six grades could not be expected to rest on anything more than a general opposition to a busing approach.

While it is clear that the practicalities of desegregation must be taken into consideration, and in some situations one race schools may be permissible, the School District is under a heavy burden to justify such continued segregation. *Swann, supra,* 402 U.S. 1, 26. Given an uncontroverted history of statutorily imposed segregation of black children, the blanket exclusion of six grades from desegregation on the naked assertions of disagreement with the educational merit of busing cannot meet this burden. The Circuit Court clearly was correct in finding the District Court's adoption of the AISD plan improper.

The Petitioners also intimate that the inclusion of Grades Kindergarten through Five in a desegregation plan violates congressional policy. 20 U.S.C. 1702(a)(5) cited for this proposition, states that "Congress finds that the risks and harms created by *excessive* transportation are particularly great for children enrolled in the first six grades." [Emphasis added]. In 20 U.S.C. 1702(a)(4), Congress defines "excessive transportation" in language similar to this Court's *Swann* limitation. "Excessive transportation" is defined as that which "creates serious risks to their [students'] health and safety, disrupts the educational process carried out with respect to such students, *and* impinges significantly on their educational opportunity." [Emphasis added]. The record in no way supports a conflict with this congressional policy.

CONCLUSION

For the above-stated reasons, Respondent Mexican American Intervenors respectfully request this Court to deny the Petition for Certiorari.

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